Supreme Court, U.S.
FILED
07-158 AUG 06 2007
OFFICE OF THE CLERK

No. 07-

IN THE

Supreme Court of the United States

FRED DEUTSCH,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Fred Deutsch ("Mr. Deutsch") appeals from a decision of the United States Court of Appeals for the Second Circuit, in which it upheld a United States Tax Court decision permitting collection by the Internal Revenue Service of alleged income tax liabilities that were assessed to him. Those assessments, however, were inappropriately based on "substitutes for return" that were prepared by the Commissioner of Internal Revenue (the "IRS") which were wrongfully transposed by the IRS onto a Form 4549 (entitled "Income Tax Examination Changes") which was signed only by Mr. Deutsch's representative. Furthermore, the substitutes for return was not signed by Mr. Deutsch, as required, or even his representative. And despite being required by the Internal Revenue Code (the "Code") and Treasury Regulations, the IRS never sent a notice of deficiency to Mr. Deutsch regarding these assessments.

Mr. Deutsch had never authorized his representative to execute any substitutes for return (or any return, for that matter), and the Power of Attorney that he extended to his representative did not contain the authorization required by the Treasury Regulations and the instructions to that Power of Attorney that would have allowed the representative to sign a return for Mr. Deutsch. Rather, Mr. Deutsch's representative consented to the assessments on Form 4549, and then the IRS wrongfully converted it into the equivalent of a return.

Even though the Tax Court conceded, and the Second Circuit agreed, that Form 4549 does not constitute a return, both courts found that Mr. Deutsch cannot challenge the assessments, and have authorized the IRS to proceed to levy on them. The Second Circuit and the Tax Court decisions are not based on any precedent and are in fact contrary to prior Tax Court decisions.

The following questions are presented for review:

1. May the assessments against an individual taxpayer be upheld when he (i) never filed an original return, (ii) never executed a substitute for return, (iii) never received a statutory notice of deficiency, and (iv) never provided to his representative the specific authorization required by Reg. § 1.6012-1(a)(5) and the instructions to Form 2848 (Power of Attorney) to execute an original return on his behalf?

2. May the statutory requirements provided in Code Section 6020(b) governing substitutes for returns, which require the issuance of a statutory notice of deficiency to a taxpayer who does not consent to a proposed assessment based upon a substitute for return, be circumvented by the IRS by merely transposing the figures thereon to a Form 4549 (captioned "Income Tax Examination Changes") and then having a taxpayer's representative execute such form, when the taxpayer neither authorized nor contemplated his representative executing an original return on his behalf and where no reported precedent exists for upholding such an assessment in the absence of a prior return having been filed by a taxpayer or his manifestation of consent to an assessment?

3. May Form 4549, which relates exclusively to (and in fact is captioned) "Income Tax Examination Changes" and lacks the verification required to constitute a tax "return" under Section 6065 of the Code, as both the United States Tax Court and the United States Court of Appeals for the Second Circuit agreed, serve as the basis of an assessment against a taxpayer who never filed original returns for the taxable years being assessed and therefore had nothing on record to "change"?

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Petitioner Fred Deutsch respectfully prays that a writ of certiorari be issued to review the opinion dated March 2, 2007 of the United States Court of Appeals for the Second Circuit in this proceeding, Docket No. 06-2361-ag.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated March 2, 2007, is reported at *Deutsch v. Commissioner of Internal Revenue*, 478 F.3d 450 (2d Cir. 2007). This opinion affirmed the (i) Memorandum Opinion of the United States Tax Court, dated February 15, 2006, designated Tax Court Memorandum 2006-27, which was unofficially reported at 91 TCM 754 (CCH) and 2006 WL 345848 (Feb. 15, 2006); (ii) Order, dated February 15, 2006 (unreported); and (iii) Decision, entered on March 22, 2006 (unreported). On May 7, 2007, the Court of Appeals denied Mr. Deutsch's petition for panel rehearing and petition for rehearing en banc, but issued no opinion in connection therewith. *See* Appendices A through D.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Order of the United States Court of Appeals for the Second Circuit was filed on March 2, 2007. The Order denying Mr. Deutsch's timely petition for panel rehearing and petition for rehearing en banc is dated and was filed on, May 7, 2007.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions involved in this case are:

(i) Code Section 6020, which provides that a substitute for return that has been prepared by the IRS must be signed by the person required to make a return (which in this context is defined by Reg. § 301.6020-1T(a)(1) as the taxpayer and not his representative).

(ii) Code Section 6065 and Treas. Reg. § 1.6065-1(a), which require a sworn verification for a return to be valid;

(iii) Treas. Reg. § 1.6012-1(a)(5), which provides that an additional statement must be added to the form of Power of Attorney promulgated by the IRS to authorize a representative to sign a taxpayer's return;

(iv) Code Section 6212(a) which concerns the IRS sending a notice of deficiency to a taxpayer;

(v) Code Section 6213(a), concerning the taxpayer's right to file a petition with the Tax Court to request a redetermination of a deficiency and the prohibition on the IRS levying on the assessments until ninety (90) days after the notice of deficiency has been mailed to the taxpayer or, if the taxpayer files a petition for redetermination, until the Tax Court has rendered a decision; and

(vi) Code Section 6330(a) through (d) regarding the right to a hearing before any levy is made on any property or right to property, and the right to appeal such determination to the Tax Court.

The language of the foregoing provisions appears in Appendix E.

STATEMENT OF THE CASE

On February 24, 2005, Mr. Deutsch filed a Petition with the Tax Court pursuant to 26 U.S.C. § 6330(d)(1) for a review of a Notice of Determination issued to him by the IRS following a collection due process hearing with the IRS Appeals Office. Mr. Deutsch had requested such a hearing to dispute the assessments that had been made against him (and enforced by levies issued against him) for the taxable years 1995, 1996 and 1997, as they did not provide him with credit for substantial net operating losses incurred in prior years and imposed tax on other amounts that did not in any sense constitute taxable income to him.

In 2001 (prior to the assessments), Mr. Deutsch executed and delivered a Power of Attorney on Form 2848 to his representative, Richard Champion ("Mr. Champion"). The Power of Attorney did not authorize Mr. Champion to file original tax returns for Mr. Deutsch (that would have to be specifically stated on Form 2848). (*See* Second Circuit Appendix, at A-31 to A-32[1]).

The IRS made the assessments based upon what are termed "substitutes for returns" that had been prepared by an IRS auditing agent and transposed upon Form 4549 (which is captioned "Income Tax Examination Changes"). Mr. Champion signed the Form 4549, thereby consenting to the immediate assessment and collection of taxes, penalties and interest for the tax years 1995, 1996, and 1997. By the language of Form 4549, Mr. Champion, ostensibly on behalf of Mr. Deutsch (but without authority), also waived any

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1. References to the Second Circuit Joint Appendix are in the format of "A-__". References to the Appendix accompanying this petition are specified as "Appendix _, at __a".

appeal rights to the IRS or any right to contest the findings in Tax Court. (*See* A-35 to A-57).

Mr. Deutsch never received any notice of deficiency from the IRS regarding these assessments as required by Code Sections 6212 and 6213. In fact, Mr. Deutsch had not been aware of, and therefore did not consent to, the assessments. He subsequently attempted to file original returns for his 1995 and 1996 tax years, as well as an amended return for his 1997 tax year. The IRS not only refused to accept or post these returns, but also seized refunds due Mr. Deutsch from subsequent years' returns (which the IRS did accept and post in its computer system).

During the Tax Court proceedings, the IRS made a motion for partial summary judgment for a determination that Mr. Deutsch could not dispute his liability for the 1995, 1996 and 1997 tax years. Without holding a hearing or trial, the Tax Court granted that motion in the Memorandum Opinion and the Order, both dated February 15, 2006. In the Decision, dated March 22, 2006, the Tax Court authorized the collection of the assessments in question.

The basis for the Tax Court's grant of the IRS' motion was that the consents on Form 4549 executed by Mr. Champion were not the equivalent of returns and, accordingly, did not require the taxpayer's verification, and that Mr. Deutsch, by extending a Power of Attorney to Mr. Champion, had in effect waived the right to a statutory notice of deficiency and was bound by Mr. Champion's actions. In so deciding, the Tax Court acknowledged (i) that the assessments were predicated solely upon Form 4549, of which Mr. Deutsch had no knowledge and to which he gave no consent; (ii) that Form 4549 does not constitute a return;

and (iii) that Mr. Deutsch had neither self-assessed the amounts for which he was being subjected to collection nor received a statutory notice of deficiency.

On May 12, 2006, Mr. Deutsch filed a Notice of Appeal to the Second Circuit from the Tax Court's decisions. The Second Circuit, after hearing oral argument, upheld the IRS' assessment against Mr. Deutsch and its ability to collect the assessed amounts from Mr. Deutsch because Section 6330(c)(2)(B) of the Code permits challenges "to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." *See* Appendix A, at 2a. Since it was undisputed that Mr. Deutsch was never issued any statutory notice of deficiency, the Court concluded that the assessments had to be upheld because Mr. Deutsch had, presumably through his representative, an "opportunity to dispute such tax liability." In doing so, however, the Second Circuit ignored case law decided by the Tax Court, which (as discussed below) had held that the phrase "did not have an opportunity to dispute such tax liability" in Section 6330(c)(2)(B) of the Code does not supersede the Code's requirements for the issuance of a statutory notice of deficiency. *See* Appendix A, at 2a-3a.

In support of this conclusion, the Second Circuit cited *Schiff v. United States*, 919 F.2d 830 (2d Cir. 1990) and *Perez v. United States*, 312 F.3d 191 (5th Cir. 2002) (*see* Appendix A, at 2a-3a), but neither one of these cases addresses the issues herein.

REASONS FOR GRANTING THE PETITION

The errors below involve matters which could adversely affect a multitude of unwary taxpayers, and the courts below do not seem to challenge the taxpayer's demonstration that the conduct of the IRS permitted it to make assessments and commence collection of the taxes assessed despite the fact that the forms utilized (Forms 4549 and 2848), the Code and Treasury Regulations simply do not permit or authorize such conduct. The grant of writ of certiorari and ultimate reversal of the Second Circuit's decision will require the IRS in no uncertain terms to follow established procedures, statutes and regulations that it has come to ignore.

The Second Circuit, in affirming the Tax Court, upheld the collection of assessments against Mr. Deutsch solely on the basis of the taxpayer's representative's execution of Form 4549, a form captioned "Income Tax Examination Changes". It is undisputed that the Form 4549 in this case was based upon substitutes for returns that had been prepared by the auditing agent. Code Section 6020(a), however, requires that a substitute for return must be signed by *the taxpayer* before it can serve as the basis for an assessment against him. *See also* Treas. Reg. § 301.6020-1T(a)(1); Appendix E, at 25a-26a. Consequently, Form 4549, standing alone, was an invalid basis for the assessments against Mr. Deutsch, and the collection action against him based upon such defective assessments was procedurally defective.

Moreover, the Power of Attorney on Form 2848 does not, in and of itself, authorize a representative to file a return on behalf of a taxpayer; in fact, according to Treasury Regulations 1.6012-1(a)(5) and the instructions to Form 2848, the taxpayer must separately and specifically grant such

authorization on the form. *See* Appendix E, at 24a. As Mr. Deutsch had not previously filed returns for his 1995 and 1996 tax years, Form 4549 had to have been determined by the IRS and the Tax Court to constitute Mr. Deutsch's return, since it served as the basis for the assessments against him.

Other than this case, there is no precedent whatsoever (and none cited by the Second Circuit, the Tax Court or the IRS) for assessing a taxpayer solely on the basis of Form 4549, (which only provides for agreement to *changes* on examination), where the taxpayer has neither filed an original return – and, hence, there is nothing to change – or the taxpayer himself has not signed the Form 4549 and thereby assessed himself. Herein, Mr. Deutsch had not (i) filed original returns; (ii) authorized his representative to file original returns; (iii) signed substitutes for returns; or (iv) signed Form 4549. Accordingly, in assessing Mr. Deutsch, the IRS had ignored the requisite procedures specified in the Code and the Treasury Regulations, as well as in the instructions to its own Form 2848.

Consequently, the Second Circuit has decided an important question of Federal tax law that is contrary in many ways to previous court decisions and the IRS' own procedures in that it determined that (i) the taxpayer can be bound by his representative's signature of Form 4549 (which also waived any appeal rights) even though Form 2848 does not authorize the representative to sign tax returns; (ii) the IRS can prepare a substitute for return without the taxpayer signing it in violation of Code Section 6020; (iii) the IRS can use substitutes for return for Form 4549; and (iv) the IRS can collect on assessments without serving a notice of deficiency. Such issues have not been, but should be, settled by this Court due to the implications to other taxpayers and

the great possibility that there can be conflicted decisions in the future given the dearth of case law. Furthermore, the fact that the courts have permitted the IRS to make the assessments and collection on them violates the taxpayer's rights to basic procedural due process under the Code and should not be upheld or sanctioned.

I. The IRS Improperly Assessed the Alleged Liability Against Mr. Deutsch

The IRS must, as an initial matter, prove a valid tax assessment exists against a taxpayer in a collection case. A valid assessment would exist in this case *if* (i) Mr. Deutsch had himself either filed a return that reflected a liability; (ii) he had specifically authorized his representative to file such a return on his behalf (a "self-assessment"); *or* (iii) alternatively, if the IRS had issued to Mr. Deutsch a notice of deficiency proposing an assessment pursuant to Code Section 6212 and Mr. Deutsch either failed to petition the Tax Court in response thereto or the Tax Court had upheld the proposed assessment.

The Tax Court explicitly acknowledged (i) that Mr. Deutsch had himself never filed a return that reported the liability which the IRS sought to collect and (ii) that no notice of deficiency had ever been issued to him. Instead, the Tax Court relied solely on the fact that Mr. Deutsch had given his representative a conventional Power of Attorney, who in turn executed Form 4549, a form which is captioned "Income Tax Examination *Changes*" (emphasis added).

Ignoring for the moment that (i) there was nothing on the record to change (since no original return had ever been filed for Mr. Deutsch's 1995 and 1996 years) and therefore,

Form 4549 cannot be applicable, and (ii) that no reported authority had ever previously upheld an assessment based upon a Form 4549 standing alone, the Second Circuit and the Tax Court completely ignored both Reg. § 1.6012-1(a)(5) and the printed instructions to Form 2848 (the Power of Attorney form in issue in this case), both of which plainly provide that an *additional statement* must be added to Line 5 of Form 2848 to authorize a representative to sign a taxpayer's return. In this case, Mr. Deutsch never gave any such authorization to his representative. Nevertheless, the IRS seeks in effect to treat Form 4549 as an original return (in the absence of anything else that resembles an original return) and bind Mr. Deutsch to its contents.

Inexplicably, neither the Second Circuit nor the Tax Court in their opinions cited this section of the regulations nor explained why Reg. § 1.6012-1(a)(5) is inapplicable in this case —or, for that matter, why the IRS may arbitrarily choose to disregard its own printed instructions on Form 2848 (although this issue was brought to these courts' attention by counsel for Mr. Deutsch). Ironically, in the past, the IRS has successfully argued before the Tax Court that an original return that failed to conform to the requirements under Reg. § 1.6012-1(a)(5) regarding the due authorization of a representative of a taxpayer should *not* be treated as a valid return. *See, e.g., Elliott v. Comr.*, 113 T.C. 125 (1999); *McGee v. Comr.*, T.C. Memo. 2000-308. As a policy matter, this Court should not permit the IRS to selectively enforce or observe the regulations under which it functions.

Nevertheless, despite its acknowledgment that the assessments for 1995 and 1996 were not based on a taxpayer's return or a notice of deficiency, the Tax Court upheld the IRS's attempt to collect the assessments in question even

though Mr. Deutsch had been unaware of such assessments and certainly never consented to them.

In this regard, the Tax Court predicated its holding upon *Zapara v. Comr.*, 124 T.C. 223 (2005) and *Aguirre v. Comr.*, 117 T.C. 324 (2001), in both of which cases the Tax Court had upheld collection proceedings against taxpayers based upon Form 4549. In *Aguirre*, however, the taxpayer had *both* filed an original return on which the changes were based *and* had *himself* also signed Form 4549, and in *Zapara*, the taxpayer had filed original returns for some years *and* had *himself* also signed the Form 4549 on which collection was based for other years. The Tax Court cited no case in which an assessment was based upon a Form 4549 where the taxpayer had neither filed a return nor consented to the assessment *himself* by signing the Form 4549: there is simply no precedent for a taxpayer being held liable for a representative's actions when the taxpayer had not authorized the representative to file what amounted to an original return on his behalf. Here, for the first time, the IRS is seeking to transform Form 4549 into an original return of the taxpayer, even though Form 4549 is not a return and cannot be transformed into one by a taxpayer's representative.[2]

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2. The Tax Court, in the penultimate paragraph of the Memorandum Opinion, cites as an additional basis for its upholding collection of the assessments in question that "[the IRS] had no reason to know that [Mr. Deutsch's representative's] conduct may have been improper." *See* Appendix C, at 19a. This, of course, suggests that the representative's conduct was improper. Furthermore, this does not present a justification for the IRS to disregard its own established procedures, and it certainly would have been simple enough for the IRS to verify that the Form 2848 extended by Mr. Deutsch to Mr. Champion was devoid of the authorization required under Reg. § 1.6012-1(a)(5) by looking at the form.

Notwithstanding these infirmities, the Second Circuit upheld the ability of the IRS to collect the assessed amounts from Mr. Deutsch because Section 6330(c)(2)(B) of the Code permits challenges "to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not have an opportunity to dispute such tax liability." *See* Appendix A, at 2a.

Code Section 6212(a) authorizes the IRS to send a notice of deficiency to the taxpayer, and Code Section 6213 permits the taxpayer to file a petition with the Tax Court for a redetermination of the deficiency (provided he receives one, of course). Furthermore, the IRS may not levy or proceed in court on the collection of the assessments until that notice of deficiency is mailed to the taxpayer and the expiration of 90 days has passed, or a decision of the Tax Court has become final from the filing of a petition for redetermination. *See* Appendix E, at 27a-28a. Therefore, by failing to mail a notice of deficiency but still trying to collect on the assessments, the IRS is violating Code Section 6213.

In this case, it is undisputed that the IRS never issued a statutory notice of deficiency to Mr. Deutsch. Hence, the Second Circuit concluded that the assessments had to be upheld because Mr. Deutsch had, presumably through his representative, an "opportunity to dispute such tax liability." *See* Appendix A, at 2a-3a.

The legal meaning of the phrase "opportunity to dispute such tax liability", however, does not permit the IRS to collect upon an otherwise defective assessment. In *Freije v. Comr.*, 125 T.C. 14 (2005), this very issue came before the Tax Court, and that court rejected the idea that Code Section 6330 usurps the prerequisites of Code Section 6213.

In *Freije*, the IRS argued, as here, that it was entitled to utilize the collection due process procedure to cure an admittedly erroneous assessment against the taxpayer, which would have required the issuance of a statutory notice of deficiency. The IRS also maintained similarly that the taxpayer had the prior opportunity under Section 6330(c)(2)(B) to dispute such tax liability, and, accordingly, the prior failure by the IRS to issue the statutory notice of deficiency should be overlooked by the Tax Court.

The Tax Court refused to do so, and stated:

> While it is true that section 6330(c)(2)(B) provides that a taxpayer whose property is the subject of a proposed levy may dispute the "underlying tax liability" if he "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability", that provision should not be construed to allow respondent to employ it to perfect an assessment made in derogation of section 6213(a).

125 T.C. at 35

The Tax Court reasoned that the collection due process context in which the matter of the IRS's failure to issue a statutory notice of deficiency first arose — a failure that was contrary to the requirements of the statute — does not excuse the failure to issue such notice, stating:

> Such an interpretation would contravene the intent underlying section 6330, a measure intended to *expand* taxpayers' rights in collection actions. See S. Rept. 105-174, at 67 (1998), 1998-3 C.B.

> 537, 603. Under the interpretation of section 6330(c)(2)(B) urged by respondent, de novo review in a section 6330 proceeding could substitute for the taxpayer's right to a deficiency proceeding under sections 6211-6216. A taxpayer's rights in the former proceeding are more circumscribed than in the latter. Moreover, such a construction would conflict with other provisions of section 6330. Section 6330(c)(1) and (3) requires, in connection with the hearing provided under section 6330, that the Appeals officer obtain verification "that the requirements of any applicable law or administrative procedure have been met" and that he take such verification into account in determining whether the levy should proceed. One requirement of applicable law is the mandate of section 6213 that, except in certain cases, including those involving termination or jeopardy assessments, an opportunity for preassessment judicial review precede the assessment or collection of any deficiency, generally defined to encompass income tax in excess of the amount reported on a return. Thus, the requirement of section 6330(c)(1) that the Appeals officer verify compliance with applicable law cannot be reconciled with an interpretation of section 6330(c)(2)(B) that allows the Commissioner to avoid compliance with section 6213(a).

125 T.C. at 36 (Emphasis in original).

As in *Freije*, the failure of the IRS in this case to issue a statutory notice of deficiency to Mr. Deutsch negates the assessment based upon the substitutes for return for Mr. Deutsch prepared by the IRS, and any prior opportunity on

the part of Mr. Deutsch's representative to have disputed the liability cannot excuse or validate such failure. *See also Manko v. Comr.*, 126 T.C. 9 (2006) (IRS cannot asses and collect taxes without a notice of deficiency)

II. The IRS Cannot Rely on Form 4549 As a Substitute for Return.

The IRS prepared substitutes for returns for the taxable years in issue that reflected the liabilities sought to be collected in this case. These were never executed by the taxpayer, and the auditing agent then transposed the numbers contained on those substitutes for returns onto the Forms 4549 executed by Mr. Deutsch's representative.

The Code contains explicit provisions concerning substitutes for return, under which detailed regulations have been promulgated. Code Section 6020(a) provides that a substitute for return that has been prepared by the IRS must be signed by the taxpayer and not his representative, in which case it will be accorded the status of a return. *See* Appendix E, at 25a-26a.

Section 6020(b) of the Code provides that the IRS may execute a return for a taxpayer who fails to make any return required by law or who makes a false or fraudulent return. In this situation, however, the IRS must follow the normal deficiency procedures and issue a notice of deficiency to the taxpayer. *Spurlock v. Comr.*, 118 T.C. 155 (2002).[3] Clearly,

3. *See also* Rev. Rul. 2005-59, 2005-37 I.R.B. 505, differentiating between instances where a taxpayer signs a substitute for return and where he does not, and holding that the unsigned return does not constitute a return, since Section 6065 of the Code requires that a return "shall contain or be verified by a written declaration that it is made under penalties of perjury."

in this case, where the substitute for return was prepared by the IRS but went unsigned by the taxpayer, the IRS was required to issue a statutory notice of deficiency.

The IRS cannot abridge a taxpayer's procedural rights under Code Section 6020, as it sought to do in this case, by taking the shortcut it did and transposing the contents of the *unsigned* substitute for return onto a Form 4549 that likewise went *unsigned* by the taxpayer, and basing collection upon that Form 4549, standing alone.

Moreover, Form 4549 itself does not constitute a return, as the Tax Court clearly stated in its Opinion ("The Forms 4549 were not returns because, among other reasons, they were not signed under penalty of perjury.") *See* Appendix C, at 16a. The Tax Court further acknowledged that Code Section 6065 and Reg. § 1.6065-1(a) clearly require a sworn verification for a return to be valid and held this requirement to be "unmistakably clear". *Id. See also* Appendix E, at 26a to 27a.

Like Form 4549, the unsigned substitute for return does not constitute a return, and an assessment based thereon — which in essence is what transpired in this case — is unenforceable without the consent of the taxpayer.

Notwithstanding the failure of the IRS to issue statutory notices of deficiency to Mr. Deutsch (as required by Code Section 6020(b) and *Spurlock v. Comr.*, 118 T.C. 155 (2002)) or to obtain Mr. Deutsch's execution of such returns (as required by Section 6020(a)), the Second Circuit upheld the validity of the assessments against Mr. Deutsch based upon substitutes for return, because Mr. Deutsch's representative

had consented to the assessment on Form 4549. In support of this conclusion, the Court of Appeals cited *Schiff v. United States*, 919 F. 2d 830 (2d Cir. 1990) and *Perez v. United States*, 312 F. 3d 191 (5th Cir. 2002), but neither one of these cases addresses Mr. Deutsch's situation.

The *Schiff* case involved the challenge by a tax protestor to the collection of an assessment against him that came about as a result of his failure to respond to statutory notices of deficiency that had been issued to him. In this case, it is undisputed that no deficiency notice was ever issued to Mr. Deutsch (who, further unlike the taxpayer is *Schiff*, is not a tax protestor).[4] Similarly, in *Perez v. United States*, the taxpayer challenged the collection of a liability against him that he himself had reported as due and had assessed against himself. Consequently, the IRS had no duty in that case to issue to him a statutory notice of deficiency before collecting the liability in question.

In this case, however, the IRS is attempting to collect an assessment based upon the taxpayer's *representative* consenting to such liability, when the taxpayer has neither filed an original return acknowledging such liability nor authorized his representative to file such a return. It is undisputed that Reg. § 1.6012-1(a)(5), as well as the instructions to the forms of Power of Attorney promulgated by the IRS, explicitly require such an authorization, and that

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4. Mr. Deutsch disputed the assertion of liability against him for the taxable years in issue because the IRS agent who prepared the substitutes for return ignored the fact that he had sustained $8,000,000 of net operating loss carryforwards that would have eliminated the alleged liability.

the Power of Attorney extended by Mr. Deutsch to his representative lacked such an authorization.[5]

Consequently, the assessment against Mr. Deutsch is based upon *no return having ever been filed*, since, as the Tax Court held and the Second Circuit affirmed, Form 4549 is not a return. Moreover, as previously noted, no prior decision appears to have ever upheld an assessment based only upon the execution of Form 4549 by a taxpayer's representative and in the absence of an original return having been previously filed by the taxpayer. And Form 2848 cannot cure this defect because it does not have the required authorizing language.

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5. Moreover, the Tax Court has upheld the validity of the need under the regulations for such an authorization, when it was *the IRS* that sought to invalidate a taxpayer's return on the basis of the lack of authorization of the signatory representative of the taxpayer. *Elliot v. Comr.*, 113 T.C. 125 (1999); *McGee v. Comr.*, T.C. Memo. 2000-308.

CONCLUSION

Because, among other reasons, the lower courts have permitted, without precedent or other support, (i) the IRS to make assessments in violation of the Code, Treasury Regulations and the instructions for its own Forms and (ii) the taxpayer's representative signing the Form 4549 to bind the taxpayer to assessments and to waive appeal without due authorization or prior knowledge, Petitioner respectfully requests that a writ of certiorari be issued to review the judgment of the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED MARCH 2, 2007

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2006

(Argued: February 23, 2007 Decided: March 2, 2007)

Docket No. 06-2361-ag

FRED DEUTSCH,

Petitioner-Appellant,

–v.–

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Before: KEARSE, CABRANES, and KATZMANN, *Circuit Judges.*

JOSÉ A. CABRANES, *Circuit Judge.*

Petitioner Fred Deutsch appeals a decision of the United States Tax Court granting the motion for summary judgment of respondent Commissioner of Internal Revenue ("Commissioner"). *See Deutsch v. Comm'r of Internal Revenue,* No. 3583-05L, 2006 WL 345848 (Tax Ct. Feb. 15, 2006). The Tax Court concluded that petitioner could not challenge the extent

of his tax liabilities for 1995, 1996, and 1997 because he previously had an opportunity to dispute those liabilities.

Petitioner's argument that he should be permitted to challenge the government's assessment of his tax liability for the two years in which petitioner did not file tax returns (1995 and 1996) is without merit. First, the Commissioner's failure to issue a formal notice of deficiency does not-taken alone-afford petitioner the opportunity to challenge his underlying liability. *See* 26 U.S.C. § 6330(c)(2)(B) (permitting "challenges to the existence or amount of the underlying tax liability . . . if the person did not receive any statutory notice of deficiency for such tax liability or did not *otherwise have an opportunity to dispute such tax liability*") (emphasis added); *see also Schiff v. United States,* 919 F.2d 830, 833 (2d Cir.1990) ("There is no requirement that the Secretary use a specific form to provide notice of a deficiency to a taxpayer."); *Perez v. United States,* 312 F.3d 191, 195 (5th Cir.2002) (noting the "substantial precedent that IRS Forms 4340 and 4549 are appropriate sources evidencing the IRS's assessment and notice of tax arrears").

We agree with the Tax Court's conclusion that petitioner had a previous opportunity to dispute his tax liability. On January 9, 2003, the Commissioner mailed to petitioner's tax attorney a Form 4549, or "Income Tax Examination Changes," containing the Commissioner's estimate of petitioner's tax liabilities. Petitioner's attorney signed the form, thereby consenting to an assessment of liability against petitioner and to a waiver of the right to contest such liability in the Tax Court. Petitioner had previously filed with the Internal Revenue Service a Power of Attorney Form that

explicitly authorized petitioner's counsel to act on his behalf for tax purposes for the years in question. Although the Power of Attorney form excluded the power to "sign certain returns," *see* Form 2848 ¶ 5, J.A. at 87, petitioner concedes that the Form 4549 "did not . . . constitute a return," *see* Pet'r Br. at 17. Accordingly, the signature of petitioner's attorney was sufficient to preclude future challenges in the Tax Court to the government's assessment of his tax liability.

Moreover, we see no reason to conclude that the IRS Form 4549's title, "Income Tax Examination *Changes,*" precludes its use to assess petitioner's tax liability simply because petitioner did not file an original return. J.A. at 35 (emphasis added). We have held that "when a taxpayer does not file a tax return, it is as if he filed a return showing a zero amount for the purposes of assessing a deficiency." *Schiff,* 919 F.2d at 832. Accordingly, any assessment contained in the Form 4549 was effectively a change to the original amount of tax liability claimed by petitioner-namely, zero dollars. *See also id.* ("There is no requirement that the IRS complete a substitute return.").

Finally, petitioner's argument that the Commissioner abused his discretion by declining to accept petitioner's amended tax returns for 1997 is without merit. *See Dover Corp. & Subsidiaries v. Comm'r,* 148 F.3d 70, 72 (2d Cir.1998) ("[T]here is nothing in either the Internal Revenue Code or the regulations thereunder that requires the IRS to accept the amended tax return in place of the original return previously filed.") (internal quotation marks omitted).

Accordingly, the decision of the Tax Court is **AFFIRMED**.

APPENDIX B — DECISION OF THE UNITED STATES TAX COURT ENTERED MARCH 22, 2006

UNITED STATES TAX COURT

Washington, DC 20217

Docket No. 3583-05L.

FRED DEUTSCH,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

DECISION

In its Memorandum Opinion (T.C. Memo. 2006-27), filed February 15, 2006, the Court determined that respondent is entitled to a partial summary judgment that petitioner is not entitled to challenge the existence or amount of his 1995, 1996 and 1997 tax liabilities during the collection review process.

By Order dated February 15, 2006, the Court ordered the parties to show cause (by March 17, 2006) as to why the Court should not enter a decision for respondent in this case. On March 16, 2006, respondent's counsel (in response to

the Court's Order of February 15, 2006) informed the Court that the parties do not object to the Court entering a decision for respondent in this case.

The premises considered, it is hereby

ORDERED and DECIDED that respondent may proceed with the collection action (the filing of a levy notice against petitioner) as determined in the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 for taxable years 1995, 1996 and 1997.

(signed) Julian I. Jacobs
Julian I. Jacobs
Judge

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES TAX COURT FILED FEBRUARY 15, 2006

T.C. Memo. 2006-27

UNITED STATES TAX COURT.

FRED DEUTSCH,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

Docket No. No. 3583-05L. Filed February 15, 2006.

MEMORANDUM OPINION

JACOBS, Judge: This collection review case is before the Court on respondent's motion for partial summary judgment pursuant to Rule 121.[1] As explained in detail below, we shall grant respondent's motion.

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1. Rule references are to the Tax Court Rules of Practice and Procedure. Section references are to the Internal Revenue Code.

Appendix C

Background[2]

On March 3, 2001, petitioner executed and submitted to respondent a Form 2848, Power of Attorney and Declaration of Representative, appointing Richard H. Champion (Mr. Champion), identified as an attorney, to act as petitioner's representative with regard to Federal income tax matters for 1995 through 1998. On March 3, 2001, Penny Drue Baird (Ms. Baird), petitioner's wife, executed and submitted to respondent a separate Form 2848, appointing Mr. Champion to act as her representative with regard to Federal income tax matters for 1994 through 1998. Paragraph 5 of each Form 2848 states:

> **Acts authorized**. The representatives are authorized to receive and inspect confidential tax information and to perform any and all acts that I(we) can perform with respect to the tax matters described on line 3, for example, the authority to sign any agreements, consents, or other documents. The authority does not include the power to receive refund checks (see line 6 below), the power to substitute another representative unless specifically added below, or the power to sign certain returns. * * *

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2. The following summary of the relevant facts is based on the parties' pleadings with attached exhibits. The facts are stated solely for the purpose of deciding the pending motion and are not findings of fact for other purposes of this case. See Rule 1(a); Fed.R.Civ.P. 52(a).

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The remainder of paragraph 5 of Form 2848 provides a space where a taxpayer may list specific additions to or deletions from the acts that the representative is authorized to perform. Those spaces on petitioner's and Ms. Baird's Forms 2848 are blank.

Petitioner allegedly informed Mr. Champion he did not owe any material amount of tax to the Internal Revenue Service (IRS) for the years at issue because he believed that he had sustained over $8 million of business losses in earlier years that carried forward to the years in question. Petitioner expected Mr. Champion to communicate with him regularly, inform him of any developments in his case, and obtain his consent to any agreement that would bind him to any tax liability.

On January 14, 2003, Mr. Champion executed on petitioner's behalf a Form 4549, Income Tax Examination Changes, consenting to the immediate assessment and collection of the following additional taxes, fraud penalties under section 6651(a)(1) and (f), and interest computed to February 8, 2003, for 1995 and 1996:

Year	*Tax*	*Penalty*	*Interest*
1995	$182,167	$136,625.25	$229,530.82
1996	114,958	86,218.50	115,781.70

On January 14, 2003, Mr. Champion executed on petitioner's and Ms. Baird's behalf a Form 4549 consenting to the immediate assessment and collection of the following

additional tax, fraud penalty under section 6663(a), and interest computed to February 8, 2003, for 1997:

Year	*Tax*	*Penalty*	*Interest*
1997	$252,079	$84,059.85	$148,078.32

The Forms 4549 state: "I do not wish to exercise my appeal rights with the Internal Revenue Service or to contest in the United States Tax Court the findings in the report."

On January 27, 2004, respondent mailed to petitioner a Final Notice, Notice of Intent to Levy and Your Right to a Hearing Under IRC 6330 for 1995, 1996, and 1997 (the levy notice). In response to the levy notice, petitioner's counsel Ira B. Stechel (Mr. Stechel) on behalf of petitioner submitted to respondent a timely Form 12153, Request for a Collection Due Process Hearing. On the Form 12153, Mr. Stechel explained that petitioner did not agree with the levy because:

> The amounts reflected as the taxpayer's liabilities for the tax years in question are incorrect and have been substantially reduced upon administrative review by the Service. In addition, the taxpayer will shortly file returns for the years in question which will supersede the substitutes for return prepared by the Service for the taxpayer's 1995 and 1996 taxable years and which will amend the taxpayer's return for his taxable year 1997, which returns will claim net operating loss carryforwards and carrybacks and passive loss carryforwards that are anticipated to eliminate much, if not all, of

the liabilities assessed against the taxpayer for these years.

By letter dated July 15, 2004, respondent advised petitioner that his case had been assigned to Appeals Officer Joan Azim of respondent's Appeals Office in Manhattan, New York.

On August 30, 2004, petitioner filed tax returns for 1995 and 1996 that reported taxes due of $19,096 and $14,334, respectively, and an amended return for 1997 that reported an overpayment of $248,093. At that time, petitioner also filed returns for 1998 through 2002 that reflected tax liabilities of $11,484 for 1998 and $22,099 for 1999 and overpayments of tax of $132,870 for 2000, $131,289 for 2001, and $242,448 for 2002 (a net overpayment of $473,024).

Mr. Stechel sent copies of the 1995 and 1996 returns and the amended return for 1997 to Appeals Officer Azim. In the cover letter, Mr. Stechel stated: "As we previously discussed, I am enclosing a set of the returns being filed contemporaneously on behalf of the taxpayer. I believe that these filings will render moot the necessity for a Collection Due Process hearing. Please call me if you have had the opportunity to review these enclosures."

Respondent did not accept the returns for 1995 and 1996 or the amended return for 1997. Respondent accepted the returns for 1998 through 2004. Respondent did not credit the overpayment petitioner claimed for 2000 because credit or refund of the overpayment was barred by section 6511(b)(1).

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On January 21, 2005, respondent's Appeals Office mailed to petitioner a Notice Of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, sustaining the filing of the levy notice against petitioner. On February 24, 2005, petitioner timely filed with the Court a petition challenging respondent's notice of determination.

Petitioner alleged in the petition that respondent erred in determining that he had any outstanding tax liability for 1995, 1996, or 1997. After filing an answer to the petition, respondent filed a motion for partial summary judgment. Petitioner filed an opposition to respondent's motion, respondent filed a response to petitioner's opposition to respondent's motion, and petitioner filed a response to respondent's response to petitioner's opposition to respondent's motion.

Discussion

Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials. *Fla. Peach Corp. v. Commissioner,* 90 T.C. 678, 681, 1988 WL 31439 (1988). Summary judgment may be granted with respect to all or any part of the legal issues in controversy if "the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law." Rule 121(b); *Sundstrand Corp. v. Commissioner,* 98 T.C. 518, 520, 1992 WL 88529 (1992), affd. 17 F.3d 965 (7th Cir.1994). The moving party bears the burden of proving that there is no genuine issue of material fact, and factual inferences will

be read in a manner most favorable to the party opposing summary judgment. See *Dahlstrom v. Commissioner,* 85 T.C. 812, 821, 1985 WL 15413 (1985); *Marshall v. Commissioner,* 85 T.C. 267, 271, 1985 WL 15379 (1985); *Jacklin v. Commissioner,* 79 T.C. 340, 344, 1982 WL 11139 (1982). The party opposing the motion, however, cannot rest upon the allegations or denials in the pleadings but must "set forth specific facts showing that there is a genuine issue for trial." Rule 121(d).

Respondent asserts that there is no issue as to any material fact and that, as a matter of law, petitioner was not permitted to challenge his underlying tax liability for 1995, 1996, or 1997 during the administrative proceeding and cannot challenge them in this proceeding. We agree.

Section 6330 entitles a taxpayer to notice and an opportunity for a hearing before the IRS can collect tax by levy. Upon request, a taxpayer is entitled to a fair hearing before an impartial officer from the IRS Office of Appeals. Sec. 6330(b)(1), (3). At the hearing, the Appeals officer is required to verify that the requirements of any applicable law or administrative procedure have been met and to consider any relevant issue the taxpayer raises relating to the unpaid tax or the proposed levy. Sec. 6330(c)(1) and (2)(A).

A taxpayer may generally raise any relevant issue relating to his/her unpaid tax liability or the proposed levy during the hearing. Relevant issues include an appropriate spousal defense, challenges to the appropriateness of the collection action, and offers of collection alternatives. Sec.

6330(c)(2)(A). The taxpayer may challenge the existence or amount of the underlying tax liability if he/she did not receive a statutory notice of deficiency for the tax liability or did not otherwise have an opportunity to dispute it. Sec. 6330(c)(2)(B).

Section 6330 does not provide an opportunity to contest tax liability for a taxpayer who chooses not to receive a notice of deficiency. *Id.;* see also *Sego v. Commissioner,* 114 T.C. 604, 611, 2000 WL 889754 (2000) (taxpayers who deliberately refused to accept delivery of the notices of deficiency repudiated the opportunity to contest the notices of deficiency in the Tax Court). For purposes of section 6330(c)(2)(B), a taxpayer who has waived his/her right to challenge the proposed assessments is deemed to have had an opportunity to dispute tax liabilities and is thereby precluded from challenging those tax liabilities in a section 6330 hearing. *Zapara v. Commissioner,* 124 T.C. 223, 228, 2005 WL 1398695 (2005); *Aguirre v. Commissioner,* 117 T.C. 324, 327, 2001 WL 1659293 (2001).

Following the hearing, the Appeals officer must determine whether the collection action is to proceed, taking into account the verification the Appeals officer has made, the issues raised by the taxpayer at the hearing, and whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary. Sec. 6330(c)(3). If the Commissioner issues a determination letter to the taxpayer following an administrative hearing, the taxpayer may file a petition for judicial review of the administrative determination.

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Sec. 6330(d)(1); *Davis v. Commissioner,* 115 T.C. 35, 37, 2000 WL 1048515 (2000); *Goza v. Commissioner,* 114 T.C. 176, 179, 2000 WL 283864 (2000). In a proceeding commenced under section 6330(d), the Court applies a de novo standard to determine a taxpayer's underlying tax liability, when and if it is at issue, and an abuse of discretion standard to review certain other administrative determinations of the Commissioner. *Sego v. Commissioner, supra* at 610.

Petitioner alleged in the petition that respondent erred in determining that he had any outstanding tax liability for 1995, 1996, or 1997. Respondent asserts that, in accordance with *Zapara v. Commissioner, supra* at 238, and *Aguirre v. Commissioner, supra* at 327, petitioner is precluded from challenging the underlying tax liabilities in this judicial proceeding because Mr. Champion, as petitioner's authorized representative, signed the Forms 4549 waiving petitioner's right to challenge the proposed assessments.

Petitioner asserts that *Zapara* and *Aguirre* do not apply because in those cases it was the taxpayers who signed the waivers. Petitioner contends that (1) the Forms 2848 did not authorize Mr. Champion to execute returns on petitioner's behalf; (2) the Forms 4549 in issue "embodied the revenue agent's determinations and served as the functional equivalent of a substitute for a return"; (3) Mr. Champion executed the Forms 4549 without petitioner's knowledge or consent; and (4) respondent assessed the taxes, penalties, and interest computed on the basis of substitutes for returns that petitioner neither consented to nor signed. Petitioner frames the issue to be herein decided as: "Whether enforced

collection by Respondent of an assessment based upon an unsigned substitute for return and unaccompanied by a Notice of Deficiency may be upheld by this Court."

Petitioner's argument appears to be as follows: (1) Because the income tax liabilities shown on the Forms 4549 were made on the basis of the substitutes for return prepared by respondent, the Forms 4549 are the equivalent of returns; (2) inasmuch as Mr. Champion was not authorized to sign returns on petitioner's behalf, Mr. Champion was not authorized to sign the Forms 4549 on petitioner's behalf; (3) since Mr. Champion was not authorized to sign the Forms 4549 on petitioner's behalf, the waivers on the forms are invalid; (4) since the waivers are invalid, respondent was required to issue petitioner a notice of deficiency; and (5) because respondent did not issue petitioner a notice of deficiency, and petitioner has not otherwise had an opportunity to challenge the tax liabilities in issue, petitioner may challenge those liabilities at the collection review hearing. Petitioner's argument is flawed in two crucial respects. First, Forms 4549 are not returns, and second, Mr. Champion was authorized to sign an agreement waiving petitioner's rights to a notice of deficiency.

In general, a document filed with the IRS is treated as a return if the document: (1) Contains sufficient data to calculate the tax liability; (2) purports to be a return; (3) represents an honest and reasonable attempt to satisfy the requirements of the tax law; and (4) is executed under penalties of perjury. *Beard v. Commissioner,* 82 T.C. 766, 777, 1984 WL 15573 (1984) (citing *Badaracco v. Commissioner,* 464 U.S. 386, 104 S.Ct. 756, 78 L.Ed.2d 549

(1984); *Zellerbach Paper Co. v. Helvering,* 293 U.S. 172, 55 S.Ct. 127, 79 L.Ed. 264 (1934); and *Florsheim Bros. Drygoods Co. v. United States,* 280 U.S. 453, 50 S.Ct. 215, 74 L.Ed. 542 (1930)), affd. 793 F.2d 139 (6th Cir.1986). The Forms 4549 were not returns because, among other reasons, they were not signed under penalty of perjury.

The significance of a sworn verification that the document is true and correct is unmistakably clear. Section 6065 specifically requires that a return "shall contain or be verified by a written declaration that it is made under the penalties of perjury." See also sec. 1.6065-1(a), Income Tax Regs. Even those Forms 1040 submitted to the IRS in which the verification language has been obliterated do not constitute valid returns. *Ledbetter v. Commissioner,* 837 F.2d 708, 710 (5th Cir.1988), affg. T.C. Memo.1986-575; *United States v. Moore,* 627 F.2d 830 (7th Cir.1980); *Cupp v. Commissioner,* 65 T.C. 68, 78-79, 1975 WL 3015 (1975), affd. without published opinion 559 F.2d 1207 (3d Cir.1977); *Lee v. Commissioner,* T.C. Memo.1981-26 (Forms 1040 that were not signed under penalties of perjury were not valid returns for that fact alone), affd. 723 F.2d 1424 (9th Cir.1984); see *Lucas v. Pilliod Lumber Co.,* 281 U.S. 245, 248, 50 S.Ct. 297, 74 L.Ed. 829 (1930) (corporate return).

As its title, "Income Tax Examination Changes", connotes, Form 4549 is the form the IRS uses to explain and/or describe changes made to a taxpayer's income tax by the IRS Examination Division. As a general rule, the Commissioner may not assess or collect a taxpayer's deficiency unless the requisite notice of deficiency is sent. Secs. 6212 and 6213. If the taxpayer agrees to changes

described on a Form 4549, the form provides a space that permits the taxpayer to indicate his/her agreement to the changes and to waive restrictions such as the statutory notice requirement on the assessment of the agreed tax. The waiver on Form 4549 (like the waiver in Form 870) permits the taxpayer to waive the right to file a pre-payment action in this Court without foreclosing his/her right to seek a refund of the tax once paid. See *Smith v. United States*, 328 F.3d 760, 766-768 (5th Cir.2003) (comparing Form 870 with Forms 870-L and 870-L(AD)); *Philadelphia & Reading Corp. v. United States*, 944 F.2d 1063, 1067 (3d Cir.1991) (a taxpayer should not sign a Form 870 unless he/she is willing to waive his/her right to challenge the tax in the Tax Court before paying the tax and any penalties due).

A taxpayer is not required to sign the Form 4549. If the taxpayer does not sign the Form 4549, the Commissioner ordinarily must issue a notice of deficiency before the tax deficiency may be assessed and collected.

Mr. Champion signed the Forms 4549 on petitioner's behalf pursuant to the authority petitioner granted to him in the Form 2848. Pursuant to the Form 2848, petitioner authorized Mr. Champion "to perform any and all acts" that petitioner could perform with respect to his taxes for 1995 through 1998, including "the authority to sign any agreements, consents, or other documents". Thus, petitioner authorized Mr. Champion to sign an agreement with respect to petitioner's tax liabilities for 1995 through 1998 and to consent to the immediate assessment and collection of those liabilities. An executed Form 2848 gives the person holding the power of attorney the authority to sign a consent

agreement on behalf of the taxpayer. See, e.g., *Scherr v. Commissioner,* T.C. Memo.1991-92 (the person holding the power of attorney was authorized to sign a consent agreement extending the period for assessment). Although Mr. Champion could not sign a return on petitioner's behalf, we have previously found that the Forms 4549 were not returns.

By signing Form 4549, Mr. Champion, as petitioner's agent, agreed to the amounts of petitioner's liabilities for taxes, penalties, and interest for the years 1996 through 1998, as well as the immediate assessment and collection of those liabilities. See *Hudock v. Commissioner,* 65 T.C. 351, 363, 1975 WL 3054 (1975) (Form 4549 is evidence of the taxpayer's consent to the immediate assessment and collection of the proposed deficiency). By signing the Forms 4549, Mr. Champion explicitly waived petitioner's right to contest in the Tax Court petitioner's tax liabilities for the years covered in the Forms 4549.

When a taxpayer executes a valid Form 2848, he is normally bound by the acts performed by his agent pursuant to the power of attorney. *Willoughby v. Commissioner,* T.C. Memo.1994-398; *Lyon v. Commissioner,* T.C. Memo.1994-351; *Lefebvre v. Commissioner,* T .C. Memo.1984-202 (1984), affd. 758 F.2d 1340 (9th Cir.1985). Petitioner does not dispute that he granted Mr. Champion authority to represent him with respect to the years at issue. Moreover, petitioner does not claim that the Form 2848 was invalid. See *Lavine v. Commissioner,* T.C. Memo.1995-270.

Even if Mr. Champion executed the waivers without seeking petitioner's consent, petitioner is bound by Mr.

Champion's acts insofar as respondent is concerned. Respondent had no reason to know that Mr. Champion's conduct may have been improper. This is so even if Mr. Champion's actions did not benefit petitioner. See, e.g., *Willoughby v. Commissioner, supra;* 1 Restatement, Agency 2d, secs. 112 comment C, 165 (1958). Accordingly, the waivers are valid, and the assessment of the tax was proper.

Under the circumstances, petitioner is deemed to have had a prior opportunity to dispute his liabilities for 1995, 1996, and 1997 within the meaning of section 6330(c)(2)(B). Consequently, petitioner is not entitled to challenge the existence or amount of his 1995, 1996, and 1997 tax liabilities during the collection review process. See *Zapara v. Commissioner,* 124 T.C. at 228; *Aguirre v. Commissioner,* 117 T.C. at 327.

To reflect the foregoing,

An order granting respondent's motion for partial summary judgment will be issued.

Appendix C

UNITED STATES TAX COURT

Washington, DC 20217

Docket No. 3583-05L

FRED DEUTSCH,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER

In its Memorandum Opinion (T.C. Memo. 2006-27), filed February 15, 2006, the Court determined that respondent is entitled to a partial summary judgment that petitioner is not entitled to challenge the existence or amount of his 1995, 1996, and 1997 tax liabilities during the collection review process. After reviewing the record, it appears to the Court that in the administrative proceeding petitioner did not raise any spousal defenses or offer any alternatives to collection of the tax liabilities and that there are no issues remaining to be decided.

Pursuant to the determination of the court as set forth in its Memorandum Opinion (T.C. Memo 2006-27), it is

Appendix C

ORDERED that Respondent's Motion for Partial Summary Judgment filed August 22, 2005, is granted; and it is further

ORDERED that, on or before March 17, 2006, the parties shall show cause as to why the Court should not enter a decision for respondent in this case.

s/ Julian I. Jacobs
Julian I. Jacobs
Judge

Dated: Washington, D.C.
February 15, 2006

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 7, 2007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

Date:

Docket	06-2361-ag
Short Title:	Deutsch v. Commissioner of Internal Revenue
Agency Number:	3583-05L
Agency:	Tax Court, Internal Revenue Service

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the __ day of May two thousand seven.

FRED DEUTSCH v.
COMMISSIONER OF INTERNAL REVENUE

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Fred Deutsch. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

Appendix D

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Thomas Asreen, Acting Clerk

By: s/ Arthur Heller
Motion Staff Attorney

APPENDIX E — STATUTORY AND REGULATORY PROVISIONS INVOLVED

§ 1.6012-1 Individuals required to make returns of income.

(a) Individual citizen or resident

* * *

(5) Returns made by agents. The return of income may be made by an agent if, by reason of disease or injury, the person liable for the making of the return is unable to make it. The return may also be made by an agent if the taxpayer is unable to make the return by reason of continuous absence from the United States (including Puerto Rico as if a part of the United States) for a period of at least 60 days prior to the date prescribed by law for making the return. In addition, a return may be made by an agent if the taxpayer requests permission, in writing, of the district director for the internal revenue district in which is located the legal residence or principal place of business of the person liable for the making of the return, and such district director determines that good cause exists for permitting the return to be so made. However, assistance in the preparation of the return may be rendered under any circumstances. Whenever a return is made by an agent it must be accompanied by a power of attorney (or copy thereof) authorizing him to represent his principal in making, executing, or filing the return. A form 2848, when properly completed, is sufficient. In addition, where one spouse is physically unable by reason of disease or injury to sign a joint return, the other spouse may, with the oral consent of the one who is incapacitated, sign the incapacitated spouse's name in the proper place on the return followed by the words "By__ Husband (or Wife)," and by the signature of the signing spouse in his own right, provided that a dated statement signed by the spouse who is signing the return is attached to and made a part of the return stating—

(i) The name of the return being filed,

(ii) The taxable year,

(iii) The reason for the inability of the spouse who is incapacitated to sign the return, and

(iv) That the spouse who is incapacitated consented to the signing of the return.

The taxpayer and his agent, if any, are responsible for the return as made and incur liability for the penalties provided for erroneous, false, or fraudulent returns.

* * * *

SEC. 6020. RETURNS PREPARED FOR OR EXECUTED BY SECRETARY.

[Sec. 6020(a)]

(a) PREPARATION OF RETURN BY SECRETARY.—If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent to disclose all information necessary for the preparation thereof, then, and in that case, the Secretary may prepare such return, which, being signed by such person, may be received by the Secretary as the return of such person.

* * * *

Appendix E

§ 301.6020-1T Returns prepared or executed by the Commissioner or other internal revenue officers (temporary).

• ***Caution:*** Under Code Sec. 7805, temporary regulations expire within three years of the date of issuance. This temporary regulation was issued on 7/15/2005.

(a) Preparation of returns. *(1) In general.* If any person required by the Code or by the regulations prescribed thereunder to make a return fails to make such return, it may be prepared by the Commissioner or other authorized internal revenue officer or employee provided such person consents to disclose all information necessary for the preparation of such return. The return upon being signed by the person required to make it shall be received by the Commissioner as the return of such person.

* * * *

SEC. 6065. VERIFICATION OF RETURNS.

Except as otherwise provided by the Secretary, any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury.

Appendix E

§ 1.6065-1 Verification of returns.

(a) *Persons signing returns.* If a return, declaration, statement, or other document made under the provisions of subtitle A or F of the Code, or the regulation thereunder, with respect to any tax imposed by subtitle A of the Code is required by the regulations contained in this chapter, or the form and instructions, issued with respect to such return, declaration, statement, or other document, to contain or be verified by a written declaration that it is made under the penalties of perjury, such return, declaration, statement, or other document shall be so verified by the person signing it.

* * * *

SEC. 6212. NOTICE OF DEFICIENCY.

[Sec. 6212(a)]

(a) IN GENERAL.—If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43, or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail. Such notice shall include a notice to the taxpayer of the taxpayer's right to contact a local office of the taxpayer advocate and the location and phone number of the appropriate office.

Appendix E

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

[Sec. 6213(a)]

(a) TIME FOR FILING PETITION AND RESTRICTION ON ASSESSMENT.—Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection. The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the

deficiency that is the subject of such petition. Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed.

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SEC. 6330. NOTICE AND OPPORTUNITY FOR HEARING BEFORE LEVY.

[Sec. 6330(a)]

(a) REQUIREMENT OF NOTICE BEFORE LEVY.—

(1) IN GENERAL.—No levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made. Such notice shall be required only once for the taxable period to which the unpaid tax specified in paragraph (3)(A) relates.

(2) TIME AND METHOD FOR NOTICE.—The notice required under paragraph (1) shall be—

(A) given in person;

(B) left at the dwelling or usual place of business of such person; or

(C) sent by certified or registered mail, return receipt requested, to such person's last known address,

not less than 30 days before the day of the first levy with respect to the amount of the unpaid tax for the taxable period.

(3) INFORMATION INCLUDED WITH NOTICE.—The notice required under paragraph (1) shall include in simple and nontechnical terms—

(A) the amount of unpaid tax;

(B) the right of the person to request a hearing during the 30-day period under paragraph (2); and

(C) the proposed action by the Secretary and the rights of the person with respect to such action, including a brief statement which sets forth—

(i) the provisions of this title relating to levy and sale of property;

(ii) the procedures applicable to the levy and sale of property under this title;

(iii) the administrative appeals available to the taxpayer with respect to such levy and sale and the procedures relating to such appeals;

(iv) the alternatives available to taxpayers which could prevent levy on property (including installment agreements under section 6159); and

(v) the provisions of this title and procedures relating to redemption of property and release of liens on property.

Appendix E

[Sec. 6330(b)]

(b) RIGHT TO FAIR HEARING.—

(1) IN GENERAL.—If the person requests a hearing under subsection (a)(3)(B), such hearing shall be held by the Internal Revenue Service Office of Appeals.

(2) ONE HEARING PER PERIOD.—A person shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax specified in subsection (a)(3)(A) relates.

(3) IMPARTIAL OFFICER.—The hearing under this subsection shall be conducted by an officer or employee who has had no prior involvement with respect to the unpaid tax specified in subsection (a)(3)(A) before the first hearing under this section or section 6320. A taxpayer may waive the requirement of this paragraph.

[Sec. 6330(c)]

(c) MATTERS CONSIDERED AT HEARING.—In the case of any hearing conducted under this section—

(1) REQUIREMENT OF INVESTIGATION.—The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.

(2) ISSUES AT HEARING.—

(A) IN GENERAL.—The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy, including—

(i) appropriate spousal defenses;

(ii) challenges to the appropriateness of collection actions; and

(iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise.

(B) UNDERLYING LIABILITY.—The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

(3) BASIS FOR THE DETERMINATION.—The determination by an appeals officer under this subsection shall take into consideration—

(A) the verification presented under paragraph (1);

(B) the issues raised under paragraph (2); and

(C) whether any proposed collection action balances the need for the efficient collection of taxes

with the legitimate concern of the person that any collection action be no more intrusive than necessary.

(4) CERTAIN ISSUES PRECLUDED.—An issue may not be raised at the hearing if—

(A) the issue was raised and considered at a previous hearing under section 6320 or in any other previous administrative or judicial proceeding; and

(B) the person seeking to raise the issue participated meaningfully in such hearing or proceeding.

This paragraph shall not apply to any issue with respect to which subsection (d)(2)(B) applies.

[Sec. 6330(d)]

(d) PROCEEDING AFTER HEARING.—

(1) JUDICIAL REVIEW OF DETERMINATION.—The person may, within 30 days of a determination under this section, appeal such determination—

(A) to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter); or

(B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States.

If a court determines that the appeal was to an incorrect court, a person shall have 30 days after the court determination to file such appeal with the correct court.

(2) JURISDICTION RETAINED AT IRS OFFICE OF APPEALS.—The Internal Revenue Service Office of Appeals shall retain jurisdiction with respect to any determination made under this section, including subsequent hearings requested by the person who requested the original hearing on issues regarding—

(A) collection actions taken or proposed with respect to such determination; and

(B) after the person has exhausted all administrative remedies, a change in circumstances with respect to such person which affects such determination.